Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

November 29, 2004

Gregory J. Vogt
202.719.3240
gvogt@wrf.com

VIA ELECTRONIC FILING

Christopher Libertelli
Senior Legal Advisor
Office of Chairman Michael Powell
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: Unbundled Access to Network Elements, WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Mr. Libertelli:

By this letter, Puerto Rico Telephone Company ("PRT"), through its undersigned counsel, responds to the ex parte communication sent to you by WorldNet Telecommunications, Inc. ("WorldNet") on November 2, 2004 ("WorldNet Letter"). The WorldNet Letter continues to misstate the competitive situation in Puerto Rico, and suggests that the FCC adopt unbundling procedures that are both unnecessary and unlawful. The WorldNet Letter should be given no weight by the agency.

I. There Is No Impairment In Puerto Rico

In its prior pleadings in the above-referenced proceedings, filed in response both to the Puerto Rico Telecommunications Regulatory Board's ("TRB") enterprise switching waiver request and the FCC's Interim Order, PRT has shown that there is no basis for finding impairment in Puerto Rico.[1] As with the rest of the country, the Commonwealth is characterized by robust competition in both the enterprise and mass markets.

In particular, Puerto Rico enjoys true facilities-based competition from a CLEC that has deployed four of its own host switches, serves between 20 and 30

[1] *See, e.g.*, Comments of PRT, CC Docket No. 01-338 (filed Jan. 30, 2004); Reply Comments of PRT, CC Docket No. 01-338 (filed Feb. 13, 2004); Reply Comments of PRT, WC Docket No. 04-313 (filed Oct. 19, 2004) ("PRT Filings").

percent of the enterprise market, and has built a 1,700 mile fiber optic network that serves 1,100 buildings. Other carriers, such as WorldNet, have had great success using resold services to win significant portions of the enterprise market. WorldNet now has approximately 50,000 lines, which is about 10 percent of the enterprise market. Puerto Rico also has extraordinarily high wireless penetration, with wireless lines actually outnumbering wireline lines. Six major wireless carriers, including several national players, provide service in Puerto Rico. Finally, VoIP service is also being offered, with Liberty Cablevision making the service available to 300,000 homes and other entities offering the service in the enterprise market.

The record is devoid of any economic or cost evidence that could refute this strong evidence of competitive success. The TRB explicitly refused to make findings on economic impairment in its waiver petition, and no other party has put forth any analysis showing that carriers would be unable to compete by investing in their own facilities. The WorldNet Letter contains nothing new on this front, and does not even attempt to offer additional evidence or analysis on impairment.

The WorldNet Letter, however, does critically misstate the nature of the impairment inquiry. The Letter incorrectly claims that since the *USTA II* court found it improper to presume impairment on a nationwide basis, it would also be inappropriate to presume a *lack* of impairment on a nationwide basis. As courts have repeatedly made clear, the FCC must make an affirmative finding of impairment in order to require unbundling.[2] Where no evidence of impairment exists, either nationally or locally, the Commission cannot make the required affirmative finding of impairment and thus cannot order unbundling. Furthermore, with respect to Puerto Rico, any such questions are mooted by the record evidence *proving* that carriers have made substantial investments in their own facilities. Thus, by definition, entry is not uneconomic.

II. WorldNet's Proposed Process Is Both Unlawful And Unnecessary

The structure proposed by WorldNet would unlawfully push impairment decisions down to the state commission level. The *USTA II* court firmly stated that "the Commission may not subdelegate its §251(d) authority to state commissions,"[3] and expressed concern about "fictitious" characterizations of state involvement as

---

[2] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999); *USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*").

[3] *USTA v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004) ("*USTA II*").

"fact-finding."[4] WorldNet's proposed state proceedings would be just the kind of fictitious fact-finding that the court warned about. By giving the Commission only 45 days to study a state "recommendation," and by giving the state commission the responsibility to create the record, WorldNet is suggesting that the FCC cede its primary analytical function to states and adopt nothing more than a rubber-stamp role. This it may not do, under both the clear terms of the Act and the court's decision in *USTA II*.

WorldNet cites the Section 224 pole attachment process as a model for its proposed structure. However, Section 224 specifically establishes a role for states in the pole attachment process.[5] As the *USTA II* court observed, there is nothing in Section 251(d)(2) that contemplates any state involvement in the impairment inquiry.[6] The fact that certain sections of the Communications Act established roles for state commissions (whereas Section 251 does not) "reassure[d]" the court that Congress intended this to be a purely federal matter.[7]

Furthermore, there is no need to impose the complex process for involving state commissions in the unbundling process that WorldNet proposes. As commenters in this proceeding have made clear, the FCC has all of the information required to conduct an impairment analysis, and the record with respect to Puerto Rico specifically is perfectly adequate to find categorically that there is no impairment.

III. The Proposed Transition Period Is Unlawful

WorldNet's call for keeping unbundling in place during state-level proceedings has no foundation in the law. The *USTA II* court has vacated the FCC's mass market unbundling requirements, and the FCC has found no evidence of impairment in the enterprise switching market. The Commission does not have the statutory authority to continue the unbundling regime, even on a temporary or

---

[4] *Id.*

[5] 47 U.S.C. § 224(c).

[6] *USTA II*, 359 F.3d at 568.

[7] *Id.*

transitional basis, if it cannot affirmatively determine that impairment exists with respect to a given UNE.

At the very least, where the evidence does not support a finding of impairment with respect to a particular UNE, the FCC must adopt rules that prohibit CLECs from adding new customers using that UNE. Moreover, the agency must put rules into place that promptly move existing UNE customers to lawful rates.

WorldNet's suggestion that a transition period should last more than two years is unsupportable. Aside from exceeding the Commission's statutory authority, a protracted transition period will unduly burden incumbent carriers and fail to strike the proper balance between the costs and harms of unbundling. In addition, a lengthy transition will needlessly delay investment in true, facilities-based competition by CLECs by diluting the proper economic signals. This will ultimately harm both competition and consumers. Indeed, CLECs have been on notice for years, as the result of a variety of court decisions, that the FCC's unbundling regime was unlawful. The transition away from this unbundling regime thus has already been underway for some time, and long predates the issuance of the FCC's next order.

IV. There Is No Justification For A Separate Hot-Cut Inquiry

WorldNet's proposition that a transitional process should not begin until a state commission certifies compliance with a batch hot cut process would also run afoul of the *USTA II* decision. This is nothing more than a creative way to subdelegate the ultimate impairment and unbundling decision to the states. Adopting this process would give the state commission the final say over whether impairment existed, something the *USTA II* court disallowed in no uncertain terms.

Further, there is no support for making hot cuts the centerpiece of either the impairment inquiry or of a transition process. The *USTA II* court called the Commission's reliance on uncertainty about hot cuts in the *Triennial Review Order* into question,[8] and the *USTA I* court found that ordinary start-up costs cannot be the basis for impairment.[9] As Verizon observed in its comments, hot cuts are nothing more than normal start-up costs, common to any industry, and the costs imposed by

[8] *USTA II*, 359 F.3d at 570.

[9] *USTA I*, 290 F.3d at 427.

hot cuts are less than many companies typically spend on acquiring new customers.[10]

Hot cuts are also of declining practical relevance. As carriers utilize VoIP, wireless, and other intermodal technologies to serve more customers, the need for physical cutovers declines. Indeed, despite the robust competition in Puerto Rico, the Commonwealth has seen no demand for hot cuts at all—competitors are using wholly-owned networks, VoIP, resale, and wireless solutions to provide service to customers, obviating the need for hot cuts. It is profoundly unlikely that there will be a sudden surge in the need for hot cuts in Puerto Rico as the market continues to evolve. Forcing a carrier such as PRT to develop a process to perform an increasingly obsolete function that has never been requested and is likely never to be sought in any volume would lead to the expenditure of great resources for no public interest benefit.

PRT does agree, however, that any standards applied to non-RBOC LECs should be applied universally. Nothing in the record supports imposing more onerous restrictions in Puerto Rico than in any other similarly-situated market in the United States. At the same time, any standard adopted by the Commission must recognize that different LECs use different operational systems, and therefore any standard adopted must be flexible enough to allow LECs to meet it without investing in costly or complex equipment upgrades. Moreover, it would be a serious problem, if not impossible, to meet a standard that required incumbents to meet performance criteria if the incumbent had received few or no requests for a process, such as for hot cuts or collocation. It would be inconsistent with *USTA II* to create a standard that indefinitely delayed the elimination of a UNE where there is no actual impairment demonstrated.

Sincerely,

/s/ Gregory J. Vogt

Gregory J. Vogt

---

[10] Comments of Verizon, WC Docket No. 04-313 at 110-111 (filed Oct. 4, 2004).